

Agenda for Superfund Division Director Meeting  
Regarding Status of Kalamazoo Site

January 15, 2009

US EPA RECORDS CENTER REGION 5



402960

1. Bankruptcy Process as it relates to MHLLC
  - a. Proof of Claims for OU1, OU2, OU5, and related Mills due to DOJ by May
  - b. Possible legal arguments in bankruptcy may grant us ability to secure clean up of OU1 (where MHLLC owns)
  - c. Letters of Credit
    - i. Suppl RI/FS Agreement for OU1, related mills and OU5
      1. \$4.67 mill in surety bond (need document)
    - ii. Plainwell Impoundment Removal
      1. \$11 mill in surety bond
      2. work 90% complete and PRP continues to do work
    - iii. Bankruptcy law and Letters of Credit – uncertain outcome
2. Options to continue work
  - a. OU1
    - i. MHLLC's contractor has stopped work on OU1
    - ii. EPA lead with money from Letter of Credit/ Special Acct?
  - b. Mill properties?
    - i. SRI/FS letter of credit?
  - c. OU2
    - i. GP lead thru settlement agreement
      1. CD
      2. AOC
      3. UAO
  - d. OU5
    - i. Plainwell Time Critical 90% complete – GP has stated will finish removal
    - ii. Plainwell Dam #2 removal?
    - iii. Remedial
      1. Peer Review of floodplain eco-risk
3. Meeting with GP
  - a. Purpose of meeting
    - i. To listen to GP
    - ii. EPA not to discuss bankruptcy
    - iii. Letters of Credit – still reviewing options
  - b. Clear signal that we intend to continue work at site (PRP search and Weyerhaeuser)
  - c. DOJ's concerns with meeting

- i. Bankruptcy
- ii. State/Trustees

Briefing Document for meeting with SFD Management  
Re: MHLLC's recent bankruptcy filing and upcoming meeting with GP

**Bankruptcy Filing:** On January 6, 2009, Lyondell Chemical Company and 79 of its subsidiaries and affiliates filed for bankruptcy (Ch. 11) in the Southern District of New York. One of the debtors is Millennium Holdings, LLC. (MHLLC), a PRP at the Site. The bar date for government proof of claims will likely be as early as July 5. EPA needs to get our formal referrals for our proof of claims to DOJ by May 5. The referrals should include a solid figure for outstanding past costs and a best current estimate (or at least a range) for the total future costs/unpaid damages. ORC will need the bulk of this information by March 31, 2009. What is needed for each affected OU is broadly described in the section below pertaining to that respective OU.

This bankruptcy filing affects 3 operable units at the Site and 3 related mill properties: 1) Allied Landfill (OU#1); 2) Willow Blvd/A-Site (OU#2); 3) The Kalamazoo River (OU#5); and, 4) the Performance Paper, Monarch and King mills. Lyondell (through its acquisition of MHLLC) is individually liable for all response actions and costs at the Allied Landfill (OU#1) and the three identified mill properties. Georgia Pacific is jointly liable with Lyondell for contamination at the two other areas, *i.e.* OU#2 and OU#5. Each area is discussed in more detail below, but first is a brief discussion of how Chapter 11 bankruptcy interfaces with CERCLA liability in general and here.<sup>1</sup>

A Chapter 11 reorganization allows a business to continue to operate pending the administration of the bankruptcy case. Confirmation of the reorganization plan binds the debtor and all creditors to the terms of the plan and operates to discharge the debtor from any debt that arose before the date of confirmation.

Because MHLLC owns OU#1, any response costs that EPA incurs with respect to that property would be entitled to priority over general unsecured claims. Also the debtor's post-bankruptcy ownership gives rise to a new post-bankruptcy CERCLA claim for ongoing releases or threats of releases at OU#1 and liability for ongoing releases at OU#5, but not past liability. The problem here is that the Bankruptcy Code provides that after notice and hearing, a party in interest may seek to abandon property that is burdensome to the estate. Abandonment has been sought and granted in cases where the estate includes contaminated property, and the clean-up costs exceed the property's as-clean value. Note that the more wealthy the estate, the more likely the court is to deny abandonment.

**Comment [BC1]:** Please note that Renita has indicated that the this sort of post-bankruptcy liability does not exist, but that is not consistent with case law we found or documents her bankruptcy counterparts at DOJ and OGC have written.

<sup>1</sup> ORC management raised the issue of whether EPA retains the right to injunctive relief despite the Chapter 11 filing. Legal research indicates that, even after a company has filed for Chapter 11 relief, EPA continues to have injunctive authority to issue cleanup orders. But, if breach of such an order gives rise to a right to payment in lieu of cleanup, then the breach is subject to discharge. Because MHLLC during the pendency of this bankruptcy is not engaging in business that violates environmental laws, we probably would not issue the company a cleanup order. If we end up issuing an order to GP for OU#2, we may want to issue that same order to MHLLC. That being said, DOJ advises that issuing orders to require cleanup by debtors, particularly non-owner debtors, is subject to risk and that EPA should consult with DOJ before issuing any clean up orders.

Another issue to deal with here is cost recovery. In chapter 11 reorganizations it has been argued by the debtor and other creditors that the government's claim should include all liability relating to pre-petition contamination of a site, and that the debtor should get a discharge and fresh start from all liability relating to the pre-petition contamination of any site. This relates to OU#2, OU#5, and the mill properties listed above. The proof of claim (POC) should include all claims for response costs at the site and all injunctive obligations with respect to the site. Again, the U.S. takes the position that injunctive obligations are not subject to discharge. However, out of an abundance of caution, we include injunctive claims in our POCs.

Please note that EPA should not discuss with GP bankruptcy matters including the letters of credit that we have for the TCRA and SRI/FS. Also please note that the proof of claim will be for all claims the U.S. has against the debtor---cross agency, cross region--and will include all sites.

#### **OU#1: Allied Landfill**

##### **STATUS:**

- o MHLLC only identified PRP
- o Bond in the amount of \$4,675,000 issued by Millennium under the terms of the 2007 AOC. A portion of that can be used for the FS.
- o CH2M Hill recently prepared a Draft Summarization of Preliminary Remedial Goals for OU#1.
- o City pressuring EPA to consider ground water pathway.
  - Question: Are we on the hook to perform a groundwater work plan as part of the FS?

##### **POSSIBLE OPTIONS (BANKRUPTCY and NON BANKRUPTCY):**

- o Bankruptcy Administrative Claim: Being that this entire OU is owned by Millennium, it may be worth arguing that this land can become a company asset if cleaned up and therefore remediation should be considered a "necessary cost of preserving the estate."
- o Bankruptcy Allowed Claim: pursue monies for ROD and remedial activities as part as the government's total allowed claim.
- o Pursue CERCLA claims against emerging company for threat of release from monarch HRDL
- o Use portion of surety bond from SRI/FS to complete the FS (with or without additional groundwater work plan)

**Comment [e2]:** Note, that a proof of claim must be prepared because quite often reorganization under Chapter 11 leads to liquidation under Chapter 7, which would mean that no company emerges after bankruptcy.

**Comment [BC3]:** It is possible that we may have to get approval from the bankruptcy court to call in the letter of credit.

##### **TO DO'S:**

- o Monetize our claims. We will have to provide an itemized cost summary for work outside of the FS, i.e. ROD, Remedial Activities, and related costs (e.g. O&M). We will have to be able to substantiate all of our costs.
- o PRP search for additional owner/operators of Allied Paper Landfill
- o Check with Bankruptcy folks to see if after restructuring Millennium would still be on the hook for ongoing contamination into the river from OU#1—if so this will bolster our administrative claim. Problem: The extent of contamination from continuous or potential erosion and surface water runoff at this landfill is questionable.

#### **OU#2: Willow Blvd./A-Site**

##### **STATUS:**

- o Ongoing erosion into River
- o Entire property owned by GP, GP joint and severally liable for damages at OU#2
- o MHLLC and GP are the only identified PRPs at this site

- ROD signed in 2006
- Joint RD/RA and Natural Resource damages CD negotiated and signed by MHLLC, but no other party
- DOJ and Trustees voiced to EPA that they want to approach GP to negotiate a work only CD and pursue costs through bankruptcy
- DOJ has contacted GP to discuss this OU and other OUs, call will probably occur next week
- If design process does not begin this spring, we may lose another construction season

**OPTIONS (BANKRUPTCY AND NON-BANKRUPTCY):**

- Enter into the currently negotiated CD with GP.
- Enter into a work only CD with GP for both Remedial and Restoration work, pursue cost through DOJ referral—we would likely lose a construction season with this option because negotiations with the Trustees take too long.
- Enter into a friendly order with GP for remediation work, oversight costs and past costs, which may have to be discounted—This option means no Trustees and no claims in bankruptcy
- Order GP to do the work and pay oversight costs—seek past costs in court
- Enter into an AOC with GP for RD only and then convert that into CD with or without Trustees, but more than likely DOJ won't deal without Trustees.
- Try to have the bankruptcy court enforce all are part of our negotiated decree (not likely to happen)

**TO DO'S:**

- Monetize our claims. If we have to pursue any of this in bankruptcy, we will have to provide an itemized cost summary for past costs, and estimate future response costs.
- Information requests under section 104(e) for insurance information only

**The Kalamazoo RiverOU#5:**

**STATUS:**

- Letter of Credit in the amount of \$4,675,000 issued by Millennium under the terms of the 2007 SRI/FS AOC. LOC in the amount of \$11,500,000 may be partially available under 2007 AOC TCRA—need to check file for amount.
- TCRA for Plainwell 1 dam almost complete – as a result, EPA may have a difficult time calling in the LOC
- Accelerated cleanup plan introduced in October 2008, plan to amend TCRA for Plainwell 2 Dam underway
- Natural Resource Trustees involved in overall plan, but not amendment of TCRA; State involved in amendment of TCRA and overall plan
- Peer review (only effects flood plains)—final recommendation in, work groups were to be formed

**OPTIONS (BANKRUPTCY AND NON-BANKRUPTCY):**

- Proceed with GP see if Weyerhaeuser wants to substitute in for Millennium, let them handle it in Bankruptcy (we would still include it in proof of claim).
- Use SRI/FS money for other areas of the river, but then would probably want to proceed as remedial activities not response work.
- Use SRI/FS money for flood plains. Continue with accelerated plan.
- Pursue claim against new MHLLC after confirmation of bankruptcy plan based on CERCLA liability for ongoing releases into the river from OU#1.

**TO DO'S:**

**Comment [GU4]:** We understand this to be true only because BB told Renita so – we don't have a signed signature page.

**Comment [GU5]:** probably can't "discount" w/o DOJ approval if we wanted to give a full covenant for past costs. May be necessary to go for future costs only.

**Comment [BC6]:** Wyrhsr not on hook for anything upstream of Plainwell Mill – i.e. Plainwell Dam 2 area.

**Comment [e7]:** It is possible that we may have to get approval from the bankruptcy court to call in the letter of credit.

- Monetize our claims. We will have to provide an itemized cost summary for past costs, oversight cost and future costs. Can use proof of claim submitted in Plainwell bankruptcy proceedings and supplement it with current information.
- Information requests under section 104(e) for insurance information only
- PRP Search – esp. Consumer Energy and Checker Motors

#### **Mill Properties:**

##### **STATUS:**

- MHLLC only currently identified PRP
- Not sure who currently owns properties, esp. Performance Mill property
- Not sure if there is release of PCBs or threat of release of PCBs at any of these properties. Do know that there are other contaminants at property.
- Not sure if there is erosion from these properties into the river or surface water runoff into the river.

##### **OPTIONS (BANKRUPTCY AND NON-BANKRUPTCY):**

- Use SRI/FS money for scoping and if necessary RI/FS.
- Seek cost recovery through bankruptcy

##### **TO DO'S:**

- Monetize our claims. We will have to provide an itemized cost summary for past costs, oversight cost and future costs. Can use proof of claim submitted in Plainwell bankruptcy proceedings and supplement it with current information.
- PRP search